SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1446

JOAN ROE, PETER POE and COE PRESS, INC.,

Petitioners,

v.

JANE DOE,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF

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INDEX

PAGE

Table of Cases and Authorities Cited ii

Statement of the Case 1

Questions 1(B), 2(A), 2(B) and part of question 1(A) of the questions presented in petitioners' brief should not be considered by the Court, for the questions are not properly presented 12

Summary of Argument 15

ARGUMENT—

POINT I—

The preliminary injunction granted in this case after an adversary hearing is not an unconstitutional prior restraint on communication 17

POINT II—

The First Amendment guarantee is not infringed by the enforcement of a patient's claim against her psychiatrist, for publishing privileged information in violation of a statute 33

POINT III—

There is no merit to petitioners' argument that an action for invasion of privacy brought by a private individual whose personal life is publicized in a "case history", can be sustained only if there is proof that the failure to conceal the complainant's identity was due to wilful disregard of "professional standards" 42

CONCLUSION 55

APPENDIX 1a

Table of Cases Cited

PAGE

A Quantity of Books v. Kansas, 378 U.S. 205 ..... 17, 18
Albany Welfare Rights Organization v. Wyman, 493 F.2d 1319 52

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 ..... 17, 32
Barsky v. Board of Regents, 347 U.S. 442 38
Bates v. Little Rock, 361 U.S. 516 42
Blumenthal v. Picture Classics, Inc., 235 App. Div. 570, 257 N.Y. Supp. 800, *aff'd* 261 N.Y. 504 20
Breard v. Alexandria, 341 U.S. 622 54
Burstyn v. Wilson, 343 U.S. 495 19

California Transport v. Trucking Unlimited, 404 U.S. 508 40
Carroll v. Princess Anne, 393 U.S. 175 ..... 18, 30
Carter v. Illinois, 329 U.S. 173 4
Chaplin v. Selznick, 293 N.Y. 529, 58 N.E.2d 719 4
City of Utica v. Mercon Inc., 71 M. 2d 680, 336 N.Y.S. 2d 880 24
Clark v. Geraci, 29 M. 2d 791, 208 N.Y.S. 2d 564 35
Clayman v. Bernstein, 38 Pa. D & C 543 19
Cleveland Board of Education v. LaFleur, —— U.S. ——, 39 L.Ed. 2d 52 44
Colten v. Kentucky, 407 U.S. 104 29
Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E. 2d 610 20
Cox v. Louisiana, 379 U.S. 536 40

Dache v. Abraham & Straus, 187 Misc. 1001, 66 N.Y.S. 2d 787 24
Davis v. Supreme Lodge, Knights of Honor, 165 N.Y. 159, 58 N.E. 891 ..... 36, 47

PAGE

Dege v. Mascot Realty Corp., 243 App. Div. 546, 275 N.Y. Supp. 884 24
Doe v. Bolton, 410 U.S. 179 44
Doe v. McMillan, 412 U.S. 306 32
Drake v. Covington County Board of Education, 371 F. Supp. 974 45
Drivers Union v. Meadowmoor Co., 312 U.S. 287 20

Feeney v. Young, 191 App. Div. 501, 181 N.Y. Supp. 481 34
Fontaine v. Dial, 303 F. Supp. 436, appeal dismissed, 399 U.S. 521 26
Freedman v. Maryland, 380 U.S. 51 ..... 18, 30, 33

Galella v. Onassis, 353 F. Supp. 196, modified on other grounds, 487 F.2d 986 ..... 43, 45
General Talking Pictures Co. v. Electric Co., 304 U.S. 175 14
Gertz v. Robert Welch, Inc., —— U.S. ——, 42 U.S. L.W. 5123 ..... 50, 51
Giboney v. Empire Storage Co., 336 U.S. 490 ..... 20, 40, 41
Ginzburg v. United States, 383 U.S. 463 10
Gregory v. Chicago, 394 U.S. 111 41
Griswold v. Connecticut, 381 U.S. 479 ..... 11, 43, 44, 46

Hammonds v. Aetna Casualty & Surety Company, 237 F. Supp. 96, 243 F. Supp. 793 36
Healy v. James, 408 U.S. 169 31
Heller v. New York, 413 U.S. 483 ..... 18, 27, 33

In re: Lifschutz, 85 Cal. Rep. 829, 467 P.2d 557 45

Kewanee Oil Company v. Bicron Corporation, —— U.S. ——, 42 U.S.L.W. 4631 19

PAGE

Kingsley Books, Inc. v. Brown, 354 U.S. 436 .....17, 18, 20, 22, 28
Kovacs v. Cooper, 336 U.S. 77 52

Lambert v. Yellowley, 272 U.S. 581 38
Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880, *aff'd* 386 F.2d 449, *cert. den.*, 391 U.S. 915 53
Lovell v. Griffin, 303 U.S. 444 17

McGillicuddy v. Monaghan, 280 App. Div. 144, 112 N.Y.S. 2d 792 25
Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 45

NAACP v. Alabama, 357 U.S. 449 42
Nader v. General Motors Corp., 25 N.Y. 2d 560, 255 N.E. 2d 765, 307 N.Y.S. 2d 647 .....11, 43
Near v. Minnesota, 283 U.S. 697 .....17, 29, 30
New York Times Co. v. Sullivan, 376 U.S. 254 .....48, 50, 51
New York Times Co. v. United States, 403 U.S. 713 ..21, 31

Olmstead v. United States, 277 U.S. 438 .....42, 43
Organization for a Better Austin v. Keefe, 402 U.S. 415 .....31, 53

Paris Adult Theater I v. Slaton, 413 U.S. 49 20
Patterson v. Colorado, 205 U.S. 454 30
Pittsburgh Press Co. v. Human Rel. Comm'n, 413 U.S. 376 .....18, 30
Public Utilities Comm'n v. Pollak, 343 U.S. 451 52

Roaden v. Kentucky, 413 U.S. 496 33
Roe v. Ingraham, 480 F.2d 102 44
Roe v. Wade, 410 U.S. 113 .....44, 45

PAGE

Rohaver v. Killiam, 37 A.D. 2d 547, 322 N.Y.S. 2d 589 .. 24
Roth v. United States, 354 U.S. 476 22
Rowan v. Post Office Dept., 397 U.S. 728 .....20, 54

Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 35
Stanley v. Georgia, 394 U.S. 557 .....43, 44
State Farm Mutual Auto Ins. Co. v. Duel, 324 U.S. 154 13

Talley v. California, 362 U.S. 60 42
Time, Inc. v. Hill, 385 U.S. 374 .....34, 47, 48, 49, 51
Times Film Corp. v. Chicago, 365 U.S. 43 15

United Public Workers v. Mitchell, 330 U.S. 75 39
United States v. Marchetti, 466 F. 2d 1309, *cert. den.*, 409 U.S. 1063 19
United States v. Thirty-seven Photographs, 402 U.S. 363 .....18, 23

Williamson v. Lee Optical Co., 348 U.S. 483 38

York v. Story, 324 F. 2d 450 45

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS CITED

Constitution of the United States, First Amendment 10, 16, 17, 18, 21, 23, 27, 33, 34, 40, 48
New York State Constitution, Article 6 §3 4
New York Civil Practice Law & Rules
Section 2218 24
Section 4504(a) 36
Section 5501(c) 25

PAGE

Section 5612(b) 4, 13
Section 6301 27
Section 6311 23
Section 6312 ..... 24, 25

New York Civil Rights Law §§50, 51 48

New York Education Law §§6509-6511 36

New York Penal Law §155.05 subd. 2(e)(v) 40

United States Supreme Court Rule 23(c) 14

8 New York Code of Rules and Regulations, §60.1 36

TEXTS AND ARTICLES CITED

Beecher, H. K., *Consent in Clinical Experimentation—Myth and Reality*, 195 Journal of the American Medical Association (1966), pp. 34-35 5

Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962 45

Breuer, J. and Freud, S., *Studies on Hysteria*, vol. 2 (standard ed., Hogarth, 1955), p. 29 38

Confidential Communications to a Psychotherapist: A New Testimonial Privilege, 47 Northwestern U. L. Rev. 384 37

Fried, *Privacy*, 77 Yale L.J. 475 ..... 42, 45

Jonas, H., *Philosophical Reflections on Experimenting With Human Subjects*, 98 Daedalus 219, 237-239 (Journal of American Academy of Arts and Sciences, 1969) 5

Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?* 67 Northwestern U. L. Rev. 153 ..... 51, 52

PAGE

Hollender, M. H., *Privileged Communication and Confidentiality,* Diseases of the Nervous System, vol. 26, No. 3 (1965), p. 173 38

Practice Commentary, CPLR 5612 (b), 7B McKinney's Consolidated Laws of New York, Civil Practice Law and Rules, CPLR 5101 to 6000, p. 536 4

Robitscher, J. B., *Pursuit of Agreement: Psychiatry & the Law* (Lippincott, 1966), pp. 232-233 38

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
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RESPONDENT'S BRIEF

Statement of the Case

The Petitioners ask the Court to vacate a preliminary injunction that prohibited the sale and distribution of a book, "In Search of A Response", during the pendency of this action. "In Search of A Response" is, for the most part, a verbatim report of separate psychiatric sessions between a psychiatrist and her patient, the patient's former husband (who died before this action was instituted) and the patient's son (A 2-6, 11, 12).

The record was sealed in the courts below and the names in the caption are, of course, fictitious. The Petitioners, the defendants in the action, are the psychiatrist, her husband

and the publisher of the book. The Plaintiff-Respondent, the former patient of the psychiatrist, is a psychotherapist (A 8-9) and an Adjunct Assistant Professor at a major university (A 9).

The names given the patient, her former husband and her child in the book are "Helena", "Henry" and "Jan". Although those are not their real names, the patient and her family will readily be recognized as the subjects of the book, by all who know the unusual events of their lives (A 12-17).

The book reveals the following circumstances of the lives of the patient, her husband and their son: The patient's husband was a professional speech writer, he started to study law at a mature age (50)[1] and thereafter became a practicing attorney;[2] the patient is a psychotherapist[3] whose father attempted to hang himself;[4] the patient's son is musically gifted[5] and had written three operas when still quite young;[6] the patient and her former husband were divorced and he then married a physically disabled practicing lawyer.[7] The circumstances of their lives are so unique that anyone who knows the patient or her

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[1] He had enrolled in a law school for the first time when quite young but left to become a writer (A 13).

[2] See p. 234 of the "Helena" section of the book "In Search of A Response", pp. 3, 39 of the section entitled "Henry", and the patient's affidavit (A 13, 14).

[3] "In Search of A Response", Helena section pp. 159, 179, Henry section p. 439 (A 13, 16).

[4] "In Search of A Response", Helena section p. 58 (A 12).

[5] "In Search of A Response", Helena section p. 322 (A 14).

[6] "In Search of A Response", Helena section p. 344 (A 14).

[7] "In Search of A Response", Henry section pp. 477, 480, 486, 546, 593 (A 16-17).

son, or who knew her former husband, would have little difficulty in recognizing them as the people of the book.

Petitioners state (at pages 8-9, and page 30, of their brief) that the steps taken by the psychiatrist to disguise the identity of the patient and her family met "the usual professional standards" in masking the patient's identity. And in their statement of questions presented, the Petitioners refer to a "finding by the Court which issued the injunction that the identity of the patient had been disguised in accordance with the usual professional standards . . ."[1] The Appellate Division of the Supreme Court of the State of New York issued the injunction under review (A 128) and it did not find that the patient's identity had been disguised in accordance with professional standards or any other standards. The court of first instance did state that Petitioners met the "usual" standards for disguising a patient's identity (A 83), but the order of that court was modified and superseded by the order of the Appellate Division (A 106). The proposed *amicus* brief of the American Psychiatric Association, the American Psychoanalytic Association, and the American Orthopsychiatric Association, arbiters of the standards of the profession, states, "Contrary to petitioner's completely unsupported assertions, this book does not meet 'the usual professional standards for disguising a patient's identity—the standards evolved over the years by the profession itself . . .'."

The Petitioners argue that the question of whether the patient can readily be identified as the Helena of the book, is one of fact; that the fact was in dispute in the court below (A 55-56, 65-66, 12-17) and that the dispute has not been resolved (Petitioners' brief, pages 4, 5). The statement that the dispute has not been resolved is misleading. For

[1] Question 1(B) at p. 2 of Petitioners' brief.

the purpose of this proceeding, it must be assumed that all factual disputes were resolved in favor of the patient.[1] It must therefore be assumed that a reader of the book who

[1] Because of the manner in which Petitioners proceeded, the New York Court of Appeals (the highest court of the State) was required to assume that all disputed facts in the record had been determined in favor of the patient. The Petitioners did not, when they asked leave to appeal to the Court of Appeals, raise any factual issue. They asked for a reconsideration only of the questions of law that they thought were dispositive of the case (A 123). Accordingly, the order of the Appellate Division of the Supreme Court of the State of New York (an intermediate appellate court) granting leave to appeal did not set forth any findings of fact, and certified that the Court's determination was made as a matter of law (A 125). When an appeal is taken to the New York Court of Appeals, and a final judgment or order is not entered pursuant to the order of the Appellate Division, and no findings of fact are made in the order granting leave to appeal, as in this case (A 106-108, 123), the jurisdiction of the Court of Appeals is limited under the New York State Constitution, Article 6 §3, to a review of questions of law only. All controverted issues of fact not set forth in the orders and opinion of the Appellate Division must be presumed, under the statute governing appeals to the New York Court of Appeals (CPLR 5612(b)), to have been determined in favor of the Respondent. There are no findings or statements of fact in the opinion or order of the Appellate Division (A 103-108) or in the order granting leave to appeal (A 124-125). The Court of Appeals was therefore required, under the law, to assume that all disputed facts in this case had been determined in favor of the patient, *Chaplin* v. *Selznick*, 293 N.Y. 529, 58 N.E. 2d 719.

The Practice Commentary on CPLR 5612(b) states, "The vigor and consequences of the presumption [that all disputes with respect to the facts not set forth in the orders of the Appellate Division shall be deemed resolved in favor of the respondent] are self-evident. The appellant 'must see to it that the statements required by the Statute are made by the Appellate Division. Otherwise all questions of fact or discretion are deemed resolved against him'." 7B McKinney's Consolidated Laws of New York, Civil Practice Law and Rules, CPLR 5101 to 6000, p. 536 (matter in brackets added).

When an order of a state court is under review, this Court must judge the state court order on the basis of "what the [state] court had properly before it in such proceeding," *Carter* v. *Illinois*, 329 U.S. 173, 176 (matter in brackets added).

Note: Article 6 §3 of the New York State Constitution, and all New York Statutes and Regulations referred to in this brief, are printed in the appendix to the brief.

knew about the patient, would have known that the book related to her and her former husband.

The psychiatrist treated the patient, her husband and their son from 1956 to 1963 (A 10). The patient and her husband told the psychiatrist the intimate details of their lives and their secret thoughts and their fantasies (A 10, 67). The psychiatrist's husband wrote in the Introduction (at page viii), that the book consists of the notes, "reproduced as closely as possible", of hundreds of the patient's and her husband's therapy sessions.

The psychiatrist contends and the patient denies that the patient, while under therapy, gave oral consent to the publication of the book (A 27, 69-70). Both agree that the psychiatrist requested, and the patient refused, to give written consent. If consent had been given during therapy as the psychiatrist claims, it would have been inefficacious for there was little likelihood of informed, voluntary agreement at that time, in view of the patient's emotional dependency upon the psychiatrist during treatment and the submissive attitude induced by therapeutic treatment.[1]

The Petitioners say that the Court at Special Term, to the extent that it resolved the question of whether consent had been given, resolved it "largely in the petitioners' favor" (Petitioners' brief at pages 4, 5). The Court in fact said:

> "I pay no attention to the alleged (and disputed) implied-in-fact consent of plaintiff to publication ten years ago. A doctor who wishes to publish confidential

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[1] H. Jonas, *Philosophical Reflections on Experimenting with Human Subjects*, 98 Daedalus 219, 237-239 (Journal of American Academy of Arts and Sciences, 1969). "The reality is that informed consent is often exceedingly difficult or impossible to obtain in any real sense." H. K. Beecher, *Consent in Clinical Experimentation—Myth and Reality*, 195 Journal of the American Medical Association (1966), pp. 34-35.

material about his patient and relies on the patient's consent should take care to get that consent in clear, unambiguous written form." (A 84).

We do not believe that was intended as an endorsement, or a qualified endorsement, of the psychiatrist's position.

The psychiatrist, to discourage further investigation of her publication of the patient's confidential communications, wrote to an attorney for the patient suggesting that the reports that the psychiatrist was publishing a book were merely "rumors", and that the patient was mistaken in assuming that a book by the psychiatrist would be about her (A 20, 21). At the time the psychiatrist's letter was written, the book was being printed. The psychiatrist later admitted that the book was in fact about the patient and her family, and only about them (A 29). The patient did not learn of the publication of the book until it was on sale in department stores and other sales outlets, a few months after the psychiatrist's letter was received (A 73).

The Appellate Division held that the alleged oral consent of the patient did "not provide a sufficient valid basis for denying the application [for a preliminary injunction]" (A 104, matter in brackets added). If the order of the Appellate Division did not dispose of the issue, the dispute must be deemed to have been determined in the patient's favor, and the Court must assume that the patient did not consent to publication (see discussion at page 4 fn. 1 of this brief).

The Introduction to the book is a panegyric on the psychiatrist, and advertises her extraordinary talents. The writer of the Introduction, the psychiatrist's husband, refers to her lovingly at "*my* beautiful L—" (emphasis ours). Recounting the coming together of, and the alleged immediate warm relationship between, the psychiatrist and

the patient's child, the psychiatrist's husband writes, "I walked away rapidly—I could not contain the surge of emotion, the unbearable anguish. I do not know how my beautiful L— could hear all this and not burst into tears." The Introduction also compares the psychiatrist's understanding of her patients with St. Francis of Assisi's understanding of the language of the birds (pages ix-xi of the Introduction).

The nature of the information confided to the psychiatrist and published in the book, may be gathered from the following passages:[1]

> "I used to see my mother nude—lovely body, unused body. Two things I used to mind—her breasts sagged and there was a great big lump under her left breast. I would worry about it—that it is cancer. Also—the lips of her vagina or her clitoris hung—long and dark—it looked so awful. What was it? Looking at a woman's vagina could not give a man pleasure—I can't believe that he gets pleasure from it. It is a place to go. I never showed my vagina to any man. No man has ever asked to look at my vagina. Cunnilingus is too anxiety provoking—I feel I will be rejected. I can't do fellatio—I can't stand it."
> (Helena section at p. 65)

* * *

> "This is the way I have been achieving orgasms—it is frightening. I have a sense of loss of immediate contact—it is not happening between me and Henry, but between me and the fantasy. Will I need the fantasy for the rest of my life to enjoy sex? Henry's body is not stimulating to me any more—something is robbing me of becoming excited by him. I just want to

[1] There are other parts of the same kind.

be more sinful with him—lewd—I like to say things to him, or if I do say—he should respond—but he doesn't. I would like to have a homosexual relationship—then I wouldn't have to have a fantasy or be lewd or sinful."
(Helena section at p. 100)

* * *

"I wanted to sleep with him [her husband], he said he was very tired. I was very aroused. He tried—he got soft. Then we tried again. For a while I couldn't stand it, 'Either you sleep with me right now or I can't stand it, I won't work on it, either yes or no. Even if I don't get aroused immediately I am ready to go.' He then entered me, but he was tense and had difficulty controlling himself. I said, 'Don't worry, this is better than nothing.' . . .

"Henry finished but I didn't. He banged on the bed, ran to the window and looked out. I felt my vagina, it was very hot and very wet—I said 'I am alive again.'
"Henry went to sleep and I masturbated . . ."
(Helena section at pp. 262, 263)

The advertisements for the book reflect the spirit of the text. They appear to be announcing a cheap novel. One advertisement described the book as a "symphony of feeling" (A 23). Another, in The New York Times, assured readers that the book would be a "sheer pleasure" and an "intense experience" (A 84). A third promised that "anyone who opens [the book] will get pulled in" (A 22).

The patient's motion for a preliminary injunction restraining the Petitioners from advertising, selling and distributing the book during the pendency of the action, was made at a Special Term of the Supreme Court of the State of New York (A 25). That Court, after consider-

ing the evidence and hearing argument (A 93, 94), granted a limited preliminary injunction restraining sale of the book through general trade channels, but permitting sale and distribution through universities, medical schools and outlets specializing in medical, psychiatric and scientific works (A 95). The limited preliminary injunction was granted approximately three months after publication.[1]

In granting the limited injunction, the Court at Special Term wrote: "As the only justification for permitting defendants to publish information obtained in confidence from their patients is the claimed scientific value of the disclosure, defendants should not attempt to distribute the book for other purposes." (A 84). The Court also gave the psychiatrist and the patient leave to apply for an immediate trial (A 95, 96).

Despite the psychiatrist's protestations that her purpose in publishing the book was to impart medical knowledge and to advance the professional practice of psychiatry (A 27, 29-30), she was unwilling to accept a distribution designed to reach psychiatrists, students, and scientists and she insisted that she had the right to sell the book to the general public. The psychiatrist rejected the offer of an immediate trial,[2] and appealed the order granting the injunction to the Appellate Division of the New York State Supreme Court (A 100).

Throughout their brief, Petitioners indicate that the book has great scientific and medical importance. In the concluding paragraph of their brief, Petitioners write that the book "may constitute a major contribution to the advancement of psychiatry" and they warn the Court that

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[1] The book was put on sale February 12, 1973 (A 34) and the limited preliminary injunction was ordered May 4, 1973 (A 86).

[2] See discussion at pp. 26, 27 of this brief.

if the preliminary injunction obtained by the patient is not vacated, "the impact upon medical writing will be direct, immediate and severely deleterious."[1] A reading of the book will reveal those statements to be solemn nonsense, but the scientific value or lack of value of the book is not in issue. The book was described by the Court below[2] as a "commercial" book (A 103), not because a book published for profit is "entitled to less than a full measure of First Amendment protection",[3] but because the way in which the book was exploited and sold, and the Petitioners' conduct in this case, led to the conclusion that the book was not, as the psychiatrist now maintains, a scholarly dissertation intended for the scientific community (A 104). As the Court said in *Ginzburg* v. *United States*, 383 U.S. 463 at p. 470, "[T]he circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes."

The question before the Court in *Ginzburg* was whether material which, standing alone, might not be held obscene, could be held obscene in the context of advertising in which it was presented. The material included a handbook that had been sent to medical and psychiatric associations and that was said, by witnesses at the trial of the action, to be

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[1] Petitioners' brief at p. 36.

[2] The reference to the Appellate Division of the Supreme Court of the State of New York as "the Court below" is appropriate. Though the order under review is the order of the New York Court of Appeals, that court merely affirmed the order of the Appellate Division and held that it was "properly made" (A 127, 125).

[3] See discussion at p. 27, fn. 21 of Petitioners' brief.

a valuable adjunct to therapy. The Court, in holding the claimed scientific utility of the publications was not controlling in view of the defendant's "own evaluation" in his advertisements, noted, in language applicable to the Petitioners' conduct and advertising in this case, "Petitioners, however, did not sell the book to such a limited audience, or focus their claims for it on its supposed therapeutic or educational value; . . ." (383 U.S. at p. 472).

The Appellate Division found in its decision in this case, that there was "no justification for the distinction . . . drawn between 'scientific readers' and the general public" (A 104), and it modified the order of the *nisi prius* court by enjoining all distribution of the book pending the trial of the action (A 107). The Court, commenting on the patient's right of action against the psychiatrist, wrote:

> "In light of the expanding recognition of invasion of privacy actions (*cf. Griswold* v. *Connecticut*, 381 U.S. 479; *Roe* v. *Wade*, —— U.S. —— [41 U.S.L.W. 4213]; *Nader* v. *General Motors Corp.*, 25 N Y 2d 560), and in view of the confidentiality accorded the physician-patient relationship, we believe that plaintiff has alleged a cognizable claim for relief and has made a sufficient showing to warrant the granting of the provisional remedy requested" (A 104-105).

The Appellate Division also ordered an early trial upon application of either party (A 108). Again, Petitioners did not seek an early trial, but requested and secured leave to appeal to the New York Court of Appeals. The order of the Appellate Division granting a preference for an early trial (A 108) is still in effect.

Questions 1(B), 2(A), 2(B) and Part of Question 1(A) of the Questions Presented in Petitioners' Brief Should Not Be Considered, For the Questions Are Not Properly Presented.

Questions 1(A) and 1(B) presented in Petitioners' brief are:

> "1(A). Whether the courts below erred in holding that it was not an invalid prior restraint upon freedom of the press, in violation of the First Amendment, to grant a preliminary injunction, completely prohibiting the distribution and sale of a concededly truthful, non-obscene book concerning matters of scientific and medical interest and importance, *particularly where the factual grounds alleged in support of the injunction remain disputed and unresolved.* (Emphasis added.)
>
> "(B). Whether such a prior restraint is constitutionally permissible in the case of a former patient seeking to enjoin publication of an over-10-year-old disguised case history, where the patient claims she is identifiable, notwithstanding the finding by the Court which issued the injunction that the identity of the patient had been disguised in accordance with the usual professional standards in case history publication."

The italicized portion of question 1(A) assumes there were unresolved disputes with respect to facts alleged in support of the injunction.[1] As shown at page 4 fn. 1 of this brief, the factual premise of the question is incorrect. All disputes of fact were resolved in the patient's favor.

---

[1] Petitioners do not maintain that there is no evidence in the record to support the Respondent's allegations. They claim that the Court below should not have affirmed the preliminary injunction because they disputed some of the statements made in support of the injunction, and they maintain that the factual conflicts were not resolved (see Petitioners' brief at p. 21).

The New York Court of Appeals could not, in reaching its decision in this case, have assumed that any factual dispute remained open and unresolved (CPLR 5612(b)). As the New York Court of Appeals did not pass upon, and could not have passed upon, the question of whether a preliminary injunction may be granted when issues of salient fact are still open, this Court may not do so. *State Farm Mutual Auto Ins. Co.* v. *Duel*, 324 U.S. 154, 160-161.

We do not believe this Court has jurisdiction to consider Question 1(B) in Petitioners' brief, for the question does not relate to the order under review. The question refers to "the finding by the Court which issued the injunction that the identity of the patient had been disguised in accordance with the usual professional standards . . ." The Appellate Division issued the injunction under review (A 128) and as stated earlier, it did not find that the patient's identity had been disguised in accordance with professional standards.[1] The factual postulate of the question is therefore false. The question 1(B) also assumes that there was an unresolved conflict with respect to a material fact. For the reasons just discussed, that conflict must be deemed to have been resolved in the patient's favor.

The Petition for a Writ of Certiorari presented (at page 2) the single question:

> "Whether the courts below erred in holding that it was not an invalid prior restraint upon freedom of the press, in violation of the First Amendment to the United States Constitution, to grant a preliminary injunction, completely prohibiting the distribution and sale of a concededly truthful, nonobscene book concerning matters of scientific and medical interest and importance."

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[1] See discussion at p. 3 of this brief.

Petitioners are attempting to present two additional questions (numbered 2(A) and 2(B) in their brief) that are not fairly comprised in the question presented in the Petition for a Writ. Those additional questions are:

> "2(A). Whether a state, if it grants to a patient a cause of action for alleged breach by a doctor of the confidential doctor-patient relationship, must limit such a cause of action in compliance with Constitutional standards.
>
> "(B). Whether the New York courts, in granting the injunction herein, have established a cause of action which does not, in fact, comply with Constitutional requirements."

Under Rule 23(c) of the Rules of this Court, only the questions presented for review in the Petition for a Writ of Certiorari, or fairly comprised therein, will be considered by the Court. *General Talking Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 177-178. Petitioners cannot now enlarge upon the question presented in the Petition for a Writ.

It cannot be said that the Petitioners intended to include the questions 2(A) and 2(B) in the question presented in their Petition, for that intent was disavowed. The Petitioners after expressing doubt in the Petition[1] with respect to the patient's rights of action against the psychiatrist for breach of the doctor-patient relationship, and for invasion of the patient's right of privacy, wrote, "Obviously, this certiorari petition is not the occasion for that debate since there are unsettled questions of state law involved as well as intermingled Federal questions."[2]

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[1] Petition for a Writ of Certiorari at p. 11.

[2] Petition for a Writ of Certiorari at p. 12.

The only question properly presented for review in this case is whether a preliminary injunction against distribution and sale of a truthful, non-obscene book, said to be on a scientific subject, is an impermissible prior restraint prohibited by the First Amendment. The Petitioners' broadside attack on preliminary injunctive relief in civil actions is similar in breadth to the challenge to licensing laws made and rejected in *Times Film Corp.* v. *Chicago*, 365 U.S. 43.

Summary of Argument

I

The Petitioners ask the Court to vacate a preliminary injunction restraining the distribution and sale of a book. Petitioners claim the preliminary injunction imposes an unconstitutional prior restraint on communication.

The preliminary injunction is not an unconstitutional prior restraint, for it was ordered after a court hearing in which evidence was submitted by both parties and in which procedural due process was accorded.

The preliminary injunction has been in effect for approximately a year and four months. The duration of the interlocutory injunction is due entirely to the series of appeals taken by Petitioners, who did not accept the offer of an immediate trial made when the preliminary injunction was granted.

The granting of an injunction restraining the sale of a book in a case such as this, is not an infringement of First Amendment rights. Injunctions prohibiting communication have been granted in many cases when the party enjoined has been guilty of wrongful conduct connected with the communication. The injunction was sought and granted to prevent the continuance of the wrong.

II

One of the Petitioners is a psychiatrist, and the Respondent had been one of her patients. The book involved in this case is in large part a verbatim report of the patient's, and her former husband's, disclosures to the psychiatrist during their treatment.

In publishing the patient's confidences, the psychiatrist ignored her statutory obligation as a physician to keep inviolate the patient's confidences communicated during the course of treatment. The patient has a right of action against the psychiatrist for the psychiatrist's breach of the physician-patient relationship.

The recognition and enforcement of the patient's right of action against the psychiatrist for revealing confidential communications does not infringe the constitutional guarantee of free press. The Constitution does not protect speech that is itself an infraction of a valid statute enacted in the public interest.

III

The psychiatrist's publicizing of information about the patient's sexual fantasies and her private opinions, attitudes and emotions was an invasion of the patient's constitutional and common-law rights of privacy. The patient is not a public or newsworthy person. The psychiatrist's claim that she attempted to shield the patient from recognition by taking steps to disguise the patient's identity is not a defense to the patient's action for the intrusion upon her privacy, particularly because the psychiatrist's revelations about the patient were so intimate and so unwarranted "as to outrage a community's notions of decency."

POINT I

The preliminary injunction granted in this case after an adversary hearing is not an unconstitutional prior restraint on communication.

"The phrase 'prior restraint' is not a self wielding sword. Nor can it serve as a talismanic test."

—Mr. Justice Frankfurter[1]

As Petitioners argue at some length, there is a rebuttable presumption that prior restraints on communication are invalid. But there are great differences between the term "prior restraints" as the courts have used it in applying the constitutional rule, and the term as it is used in the Petitioners' brief.

The doctrine against prior restraints was developed and applied to prevent unwarranted government interference with communication. Constitutional opposition to previous restraints was directed originally against laws requiring government approval of books before they could be published. *Lovell* v. *Griffin*, 303 U.S. 444, 451-452. The constitutional rule has been expanded, *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, 413 U.S. 376, 382. The term prior restraint is now used by this Court to identify a curb on communication imposed by law or originated by an agency of the government, where there is no assurance of an adversary court proceeding to test the validity of the restriction before, or immediately after, it is imposed. *Near* v. *Minnesota*, 283 U.S. 697; *Lovell* v. *Griffin*, 303 U.S. 444; *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58; *A Quantity of*

[1] Opinion in *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 at p. 441.

Books v. *Kansas*, 378 U.S. 205, 210-211, 213; *Freedman* v. *Maryland*, 380 U.S. 51; *Carroll* v. *Princess Anne*, 393 U.S. 175; *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 367; *Heller* v. *New York*, 413 U.S. 483; *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, 413 U.S. 376, 389-390. "The special vice of prior restraint," Mr. Justice Powell wrote in *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, 413 U.S. 376, 390, "is that the communication will be suppressed either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."

The Petitioners attempt in their brief in this case, to further extend the constitutional rule against prior restraints to cover virtually all orders in private actions enjoining the publication or distribution of communications that are not obscene or untruthful. There isn't any case law or legal authority to support their position.

Petitioners write, at page 17 of their brief, that the sole case known to them in which "this Court ever approved a form of prior restraint of circulation of the printed word is *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 . . . ." (In Petitioners' private lexicon, any injunction is a "form of prior restraint".)[1] We assume Petitioners limited the statement in the interest of accuracy, to a "restraint of *circulation* of the *printed* word" (emphasis ours). With that limitation, the statement has little significance, for as Petitioners know, there are many cases in which this Court, and other courts, approved injunctions against spoken communication, and communication through picketing, in motion pictures and other media. Some of those cases are outlined on the following pages. The doctrine of those cases applies, of course, to circulation of the printed

[1] The case cited relates to preliminary and final injunctions.

word. As Mr. Justice Clark wrote in *Burstyn* v. *Wilson*, 343 U.S. 495, 503, "Each method [of communication] tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." (Matter in brackets added.)

In *Kewanee Oil Company* v. *Bicron Corporation*, —— U.S. ——, 42 U.S.L.W. 4631, this Court reinstated an injunction against the disclosure of trade secrets (of scientific value) by a former employee of the petitioner. In *Kewanee Oil Company*, as in the case at bar, the injunction was requested to prevent disclosure of information given in confidence. The information was confided, in both cases, in connection with the employment of the person enjoined. Mr. Chief Justice Burger, writing for the Court in *Kewanee Oil Company*, drew a significant parallel between a state's power to regulate trade secrets and its power to regulate writing.

In *United States* v. *Marchetti*, 466 F.2d 1309, *cert. den.*, 409 U.S. 1063, the defendant, a former employee of the Central Intelligence Agency, was enjoined from publishing a book disclosing information that he had sworn to keep secret and that he received in connection with his work.

In *Clayman* v. *Bernstein*, 38 Pa. D & C 543, a doctor took photographs showing his patient's facial disfigurement. The Court held, in sustaining the complaint for an injunction prohibiting further dissemination of the photographs by the doctor, "The powers of equity are not so impotent that such a situation will be tolerated. The remedy afforded must be such as to destroy the roots of the evil and this can only be done by mandatory injunction" (at p. 550).

In *Commonwealth* v. *Wiseman*, 356 Mass. 251, 249 N.E.2d 610, the Court in affirming an injunction against distribution of a documentary film about conditions in a state mental institution, said: "[The film is an] indecent intrusion into the most private aspects of the lives of these unfortunate persons in the Commonwealth's custody . . ."[1]

In *Blumenthal* v. *Picture Classics, Inc.*, 235 App. Div. 570, 257 N.Y. Supp. 800, *aff'd*, 261 N.Y. 504, the Court enjoined distribution of a motion picture that violated plaintiff's statutory right of privacy.

In *Drivers Union* v. *Meadowmoor Co.*, 312 U.S. 287, this Court sustained an injunction against communication through peaceful picketing because earlier acts of violence gave the picketing a coercive effect. See also *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, discussed at page 40 of this brief.

In *Rowan* v. *Post Office Dept.*, 397 U.S. 728, the Court sustained the validity of a statute that called for the issuance of orders prohibiting a mailer from sending any mail to one who complained that a latter previously received from the mailer was erotically arousing.

In *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49, this Court held a law providing for the issuance of a civil injunction against exhibition of obscene material, to be valid.

Kingsley Books, Inc. v. *Brown*, 354 U.S. 436, involved a statute that authorized the issuance of a preliminary injunction (and a permanent injunction after trial) against distribution of obscene matter. The Court held that the statutory scheme was not an unconstitutional prior restraint on the press. Mr. Justice Frankfurter wrote for the Court in *Kingsley Books, Inc.* v. *Brown*, referring to the

[1] 249 N.E. 2d at 615.

phrase "prior restraint", 354 U.S. at pp. 441-442, "The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties. 'What is needed,' writes Professor Paul Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to a more particular analysis.'"

In his concurring opinion in *New York Times Co.* v. *United States*, 403 U.S. 713, Mr. Justice White gave the following example of circumstances in which injunctive orders against communications have been approved (403 U.S. at p. 730 fn. 1):

> "The National Labor Relations Board routinely issues cease-and-desist orders against employers who it finds have threatened or coerced employees in the exercise of protected rights. See 29 USC § 160(c). Similarly, the Federal Trade Commission is empowered to impose cease-and-desist orders against unfair methods of competition. 15 USC § 45(b). Such orders can, and quite often do, restrict what may be spoken or written under certain circumstances. See, e.g., NLRB v. Gissel Packing Co. 395 US 575, 616-620, . . .
>
> "[N]o one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another. See Westermann Co. v. Dispatch Co. 249 US 100 . . .
>
> ". . . [A]nd when the press is enjoined under the copyright laws the complainant is a private copyright holder enforcing a private right. These situations are quite distinct from the Government's request for an injunction against publishing information about the

affairs of government, a request admittedly not based on any statute."

In each of the cases just outlined in which the Court enjoined communication, the conduct of the defendant, not the communication, was the central issue. That is also true of the instant case. The psychiatrist, not her book, is on trial here.[1] The communication was not enjoined because it expressed an idea that is disapproved, or because of some quality of the expression. The book was enjoined temporarily, and it is hoped it will be enjoined permanently, because the publication involved a breach of the trust imposed in the psychiatrist by one who turned to her for help, and because it exposed a private person's private life to public view.

Petitioners refer to *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, as "an irrelevant obscenity case."[2] The assumption that the opinion is irrelevant because the books involved in the case were said to be obscene, betrays a misunderstanding of the doctrine relating to prior restraints. The term "prior restraints" refers to the means or method of restraint, not to the reason for the restriction or the nature of the objections to the communication. The constitutional objection to prior restraints, as previously noted, is that they do not afford adequate proceedings in advance of suppression, or immediately thereafter, for determining whether the material in question is constitutionally protected, or may be proscribed. See cases cited at pages 17 and 18 of this brief.

If one accepts Petitioners' premise that prior restraints may be countenanced whenever a work is said to be obscene,

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[1] See *Roth* v. *United States*, 354 U.S. 476, 495, concurring opinion of Mr. Chief Justice Warren.

[2] Petitioners' brief at p. 10.

then all one need do is make that accusation against the book "In Search of A Response" (for which there is warrant).[1] The Petitioners would not, in their view, then be in a position to claim that the preliminary injunction in this case constituted an impermissible prior restraint.

The Petitioners do not complain that the proceedings below failed to "ensure the necessary sensitivity to freedom of expression," *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 367. The procedures governing the application for and issuance of preliminary injunctions in New York State, followed in this case, meet the requirements of due process and the demands of the First Amendment.

The preliminary injunction against further sale of the psychiatrist's book was made after an adversary hearing. Such injunctions may not be granted *ex parte* (CPLR 6311). The application for an injunction was made by an order to show cause served personally on Petitioners (A 26). The psychiatrist had notice of the proceedings and ample opportunity to present relevant evidence before a judicial determination was made. Although the order to show cause was returnable four days after service, it was adjourned thirteen days (A 86) to afford the Petitioners time to prepare their defense. The parties had ten days after the adjourned hearing date to submit additional evidence (A 87). The limited preliminary injunction was granted by the court of first instance approximately one month after all evidence had been submitted (A 86).

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[1] Petitioners' report (at p. 17 of their brief, fn. 7) of the oral argument of counsel for the patient is in part inaccurate. Counsel for the patient did not say that the book could not be attacked as obscene. He said the book was not challenged on that ground. The report is accurate in stating that the word "quackery" was used to characterize the psychiatrist's self-advertising.

The New York statute governing the issuance of preliminary injunctions provides for the submission of affidavits and other evidence on the application for the remedy (CPLR 6312). Affidavits on such motions must follow the rules of evidence and must be on knowledge. *City of Utica* v. *Mercon Inc.*, 71 M. 2d 680, 336 N.Y.S.2d 880, 883. When there is conflict with respect to critical facts on a motion, oral proof may be taken and witnesses may be subpoenaed, examined and cross-examined. *Dege* v. *Mascot Realty Corp.*, 243 App. Div. 546, 275 N.Y. Supp. 884; *Dache* v. *Abraham & Straus*, 187 Misc. 1001, 1003, 66 N.Y.S.2d 787, 789. A full testimonial hearing (before a jury, if the issue is triable of right by jury) may be ordered with respect to disputed facts, upon application of any of the parties (CPLR 2218). The Petitioners did not ask for a testimonial hearing in this case.

One seeking a preliminary injunction in the New York State courts has the burden of proving the existence of a valid cause of action against the defendant (*Rohaver* v. *Killiam*, 37 A.D.2d 547, 322 N.Y.S.2d 589), in this case that the psychiatrist's book violated the patient's rights.[1] And

[1] The Petitioners state (at p. 6 of their brief), that "the lower courts" held that Petitioners must bear the burden of justifying the publication of the book. There is no basis for that statement. The claimed justification for the assertion is the statement in the decision of the Court at Special Term, "As the only justification for permitting defendants to publish information obtained in confidence from their patients is the claimed scientific value of the disclosure, defendants should not attempt to distribute the book for other purposes." (A 84). See Petitioners' brief at p. 10. It will be recalled that that determination of the Court at Special Term was overruled by the Appellate Division (one of the "lower courts"). Also, it is clear that Petitioners distorted the meaning of the Special Term decision. The Court obviously did not hold that the Petitioners had the burden of proving their right to publish, but referring to Petitioners' claimed justification for having published the book in violation of the doctor-patient privilege, limited the sale to the audience for which, the psychiatrist said, the book was intended.

it must be shown before an injunction is granted, that the movant will suffer irreparable injury if the preliminary injunction is not granted. *McGillicuddy* v. *Monaghan*, 280 App. Div. 144, 112 N.Y.S.2d 792.

A party obtaining a preliminary injunction in a New York State court is required to file an undertaking to pay all damages and costs that may be sustained by reason of the injunction, if after a full trial it is determined that the moving party is not entitled to an injunction (CPLR 6312 (b)). In the instant case, the patient was required to file a bond to assure performance of the undertaking (A 95). The amount of the bond was increased by the Appellate Division on the appeal to that Court (A 107).

In accordance with New York practice when a preliminary injunction is granted, the parties in this case were permitted to proceed to trial immediately (A 95, 96, 107, 108). The psychiatrist refused to take advantage of the opportunity.

One may appeal as a matter of right to the Appellate Division of the Supreme Court of the State of New York from an order granting a preliminary injunction, and the psychiatrist did appeal (A 100). The Appellate Division is required to review questions of fact and of law raised on such appeals (CPLR 5501(c)).

It is clear that the injunction granted in this case cannot properly be described as an unconstitutional prior restraint. There was an adversary hearing in court, with all procedural safeguards afforded, before the preliminary injunction was granted, and an immediate plenary trial was offered thereafter. The Petitioners could have had a testimonial hearing on the motion for a preliminary injunction, but did not request it. In any event, there is no requirement that the adversary hearing "be a fully matured action at

law." *Fontaine* v. *Dial*, 303 F. Supp. 436, 440, fn. 7, *appeal dismissed*, 399 U.S. 521.

The psychiatrist complains repeatedly in her brief that the preliminary injunction has been in effect for more than a year and that the case has not yet been tried. But the psychiatrist was solely responsible for the delays, and has no valid reason to complain about them. In May 1973, shortly after the limited injunction was granted, the patient sought an early trial (A 97). The psychiatrist's attorneys wrote the judge to whom the case had been assigned, "We do not join in any application for an immediate trial," and gave as their reason the necessity for extended examinations before trial (A 98, 99).

The Petitioners write, at page 6 of their brief, that they sought at every stage to expedite the proceedings in the state courts. There is nothing in the record to support that statement and it is not correct. Petitioners say (at pages 24 and 25 of their brief) that an early trial was not feasible because of the "vast amount of factual matter" to be reviewed, and they note (at page 25 of their brief) that six days will have been "consumed" in their interrogation of the patient. The interrogation was needlessly prolonged and could, in any event, have been taken on consecutive days.[1] The Petitioners' examination before trial of the patient in this case has not yet been completed, though it began early in 1973. Letters sent to Petitioners' attorneys asking them to set dates for the completion of the examination were not answered. It was not until counsel for the patient moved on July 3, 1974 for a protective order terminating the examination, that the psychiatrist's attorneys

[1] Petitioners indicate (at p. 25 fn. 7 of their brief) that counsel (Petitioners') and the litigants (Petitioners) may not be able to devote their entire time to a single case. If so, they may not complain of the consequent delays.

agreed to conclude it after one further session. The three successive appeals taken by the psychiatrist also precluded a trial during the period following the granting of the first limited injunction.

The psychiatrist, having been solely responsible for the length of the period the preliminary injunction has been in effect, cannot complain that she has been denied a prompt full trial of the issues in this case. As Mr. Chief Justice Burger wrote in *Heller* v. *New York*, 413 U.S. 483 at pp. 490, 491:

> "Although we have refrained from establishing rigid, specific time deadlines in proceedings involving seizure of allegedly obscene material, we have definitely excluded from any consideration of 'promptness' those delays caused by the choice of the defendant. See United States v. Thirty-seven Photographs, supra, at 373-374. In this case, the barrier to a prompt judicial determination of the obscenity issue in an adversary proceeding was not the State, but petitioner's decision . . . Cf. Kingsley Books, Inc. v. Brown, 354 U.S. at 439 . . ."

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The substance of Petitioners' argument in Point I of their brief is that an injunction against publication granted after a full trial is an improper prior restraint, and a preliminary injunction, granted before an action is tried, is "an all the more egregious violation of the First Amendment."[1] Injunctive relief *pendente lite* is granted in New York when a final judgment would be ineffectual if preliminary relief is not afforded (CPLR 6301). There was a

[1] Petitioners' brief at p. 20. (There isn't any citation of authority for the statement.)

critical need for the relief in this case, for if it had not been granted, a judgment in the patient's favor after trial would have been academic. A final judgment enjoining the sale of "In Search of A Response" would not be meaningful years[1] after the patient's personal and private thoughts and experiences were being published and sold, and advertised as a "symphony of feeling" and as giving "sheer pleasure."

To deny state courts the right to grant preliminary injunctive relief in all cases involving communication would take from the states the power to grant adequate relief in cases where the final judgment would be empty if interlocutory relief were not granted. Money damages will not, in a case such as this, restore a plaintiff's dignity, or her place in society, and they cannot compensate for the loss of her self-esteem and the esteem of others.

It cannot reasonably be maintained that granting a preliminary injunction against the book in this case will have a chilling effect on the right of expression. "[A] pragmatic assessment of its operation (that is, the operation of the injunction) in the particular circumstances"[2] of this case indicates, at most, that doctors who divulge their patients' secrets to the world will be faced with the possibility of an order in a civil suit prohibiting them from continuing to do so.

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[1] That is the Petitioners' estimate (at p. 6 of their brief) of the duration of the trial and appeals. The estimate is a conservative one in view of Petitioners' glacial pace in conducting pretrial proceedings.

[2] *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 442; matter in parentheses ours.

The Authorities Relied On By Petitioners Do Not Support Their Position That An Injunction In A Private Action, Granted After A Preliminary Adversary Hearing, Is A Prohibited Form of Prior Restraint.

Petitioners virtually rest their case on the decision in *Near* v. *Minnesota*, 283 U.S. 697. "Any analysis of prior restraint must begin," they write, "and indeed can nearly end with the Court's opinion [in that case]."[1] As is evident throughout its opinion, the Court in *Near* was concerned with a statutory censorship system.[2] The Court stated specifically that it was not passing upon, and was not concerned with, the question presented here, that is, "the extent of authority to prevent publications in order to protect private rights according to the principles governing . . . courts of equity."[3]

The statute struck down in *Near* authorized public officials to maintain an action to enjoin the publication of a newspaper (including the publication of future editions) if it was found that the periodical had been devoted largely to malicious and defamatory matter. The statute permitted an injunction against publication of true charges of corruption against public officers[4] unless the publisher proved to the satisfaction of the court that the charges were published with good motives and for justifiable ends. The burden of proving that the publication was justified, was on the publisher. The statute also provided for the issuance of *ex parte* injunctions pending a hearing, and for permanent injunctions after trial.

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[1] Petitioners' brief at p. 11.

[2] See opinion in *Near*, 283 U.S. 697, pp. 701, 707, 708-713, 720-721.

[3] 283 U.S. at p. 716.

[4] 283 U.S. at pp. 710-713.

"The question," Mr. Chief Justice Hughes wrote for the Court in *Near*, "is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed."[1] The answer, of course, was that the prior restraints imposed by the statute were unconstitutional.

In its discussion of the historical background of the rule against previous restraints, the Court quoted *Patterson* v. *Colorado*, 205 U.S. 454, 462, to the effect that "the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practised by other governments' . . .".[2] Mr. Justice Powell, speaking in *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, 413 U.S. 376, 390, of the opinion in *Near*, said, "[the Court] has never held that all injunctions are impermissible" (matter in brackets added).

In *Carroll* v. *Princess Anne*, 393 U.S. 175, which Petitioners cite as authority for the statement that the courts refuse to enjoin communication even if it encourages race hatred and may cause rioting,[3] the injunction condemned as a prior restraint had been issued *ex parte*, to county officials. The underlying question of the case, as the Court conceived it, was "whether and by what processes and to what extent the authorities of the local governments may restrict petitioners . . ." (393 U.S. at p. 179). The Court concluded, quoting from the opinion in *Freedman* v. *Maryland*, 380 U.S. 51, 58, "a noncriminal process of prior re-

[1] 283 U.S. at 713.

[2] The Court also quoted the following from Madison's Report on the Virginia Resolutions, 'This security of the freedom of the press requires that it should be exempt not only from previous restraint by the executive as in Great Britain, but from legislative restraint also." 283 U.S. at p. 714.

[3] Petitioners' brief at page 16.

straints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system'."[1] The preliminary injunction was granted in this case after an adversary hearing under procedural safeguards.

The Court, discussing the validity of the injunction considered in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, (on which Petitioners rely) noted that the injunction "operates not to redress alleged private wrongs, but to suppress on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." (402 U.S. at pp. 418-419).

In *New York Times Co.* v. *United States*, 403 U.S. 713, cited by Petitioners as controlling, the United States government, and the District of Columbia, sought injunctions against publication of a classified government study on the ground that publication "could" or "might" or "may" prejudice the national interest. As Mr. Justice White indicated in the portion of his opinion quoted at pages 21 and 22 of this brief, the situation presented in that case was "quite distinct" from one presented in private litigation to enforce a private right. The Court in a *per curiam* opinion denied injunctive relief on the ground that the government failed to show justification for the restraint. As shall be seen in the following points dealing with the reasons for the complaint against the Petitioners' book, there is ample justification for the minor restriction in this case, of a physician's disclosure of confidential information.

In *Healy* v. *James*, 408 U.S. 169, on which Petitioners also rely, the administration of a college, acting for the

[1] 393 U.S. at p. 181

state,[1] refused to recognize a chapter of the Students for a Democratic Society as a campus organization. The question presented was not whether an injunction against the distribution of printed matter is a prohibited form of prior restraint, but whether a refusal of recognition, which prevented the organization from using college facilities and from announcing meetings and other activities in the student newspaper, was a denial of freedom of expression. The Court held that nonrecognition could not properly be based upon disagreement with the students' beliefs or associations, or the belief that the group would be a disruptive influence, but that non-recognition could properly be based on the group's refusal to abide by reasonable campus regulations.

Doe v. *McMillan*, 412 U.S. 306, cited by Petitioners, also has no bearing on the issues of this case. It was an action brought against members of Congress, the public printer and the Superintendent of Documents. The suit was instituted by parents of school children to enjoin the publication of a report that was said to be defamatory and an invasion of the privacy of children named in the report. The questions considered by the Court related to the scope of Congressional inquiry and the principle of separation of powers.

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58, on which Petitioners also rely, involved the activities of a commission appointed by a state legislature. The commission suppressed books it thought objectionable, by coercing booksellers to stop selling the books. The Court held that the petitioners-publishers in that case were entitled to injunc-

[1] See concurring opinion of Mr. Justice Rehnquist, 408 U.S. at p. 201, in which he described the Court's opinion as one relating to the constitutional limitations on the government's acting as administrators of a college.

tive relief prohibiting the commission's practices, because the commission effectively suppressed books without affording booksellers and publishers a hearing of any kind to determine whether the suppressed books were constitutionally protected.

Heller v. *New York*, 413 U.S. 483, *Roaden* v. *Kentucky*, 413 U.S. 496, and *Freedman* v. *Maryland*, 380 U.S. 51, all cited by Petitioners, involved seizure of films by government officers before adversary hearings were conducted.

None of the cases relied on by the Petitioners deals with the validity of an injunction or a preliminary injunction granted in a private civil suit after an adversary hearing.

POINT II

The First Amendment guarantee is not infringed by the enforcement of a patient's claim against her psychiatrist, for publishing privileged information in violation of a statute.

The Appellate Division found that the patient presented two cognizable claims for relief in this case, one for breach of the physician-patient relationship (discussed in this point) and the second for violation of the patient's right of privacy (discussed in point III of this brief) (A 104). Petitioners concede that it is "the business of the New York courts and the New York legislature to determine whether that state is to accord" such right of action.[1] But they complain that the courts below failed to take into account "the limitation the Constitution imposes on any such action."[2]

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[1] Petitioners' brief at p. 28.

[2] Petitioners' brief at p. 29.

Petitioners do not, in their brief, define the limitations on the right of action that the Constitution imposes. They suggest that the constitutional boundaries have not been drawn because, they say, the right of action is a new one. "[T]he New York courts . . . appear to have created a new cause of action," Petitioners write, and they urge the Court to "clarify that any such cause of action must comply with First Amendment requirements." [1]

The issues relating to a patient's right of action against his or her physician, for revealing privileged information obtained in the course of treatment, and the possibility that the right may infringe the constitutional guarantee of freedom of expression, are not properly before the Court.[2] We shall discuss the issues in the event the Court wishes to consider them.

The right of a patient to sue a physician for disclosure of confidential information, is of course not a new one, and this Court has previously taken note of it. In *Feeney* v. *Young*, 191 App. Div. 501, 181 N.Y.Supp. 481, the Court held that the doctor's public exhibition of a film showing his patient in childbirth was actionable, despite the patient's consent to the showing of the film to medical societies. Mr. Justice Harlan in his concurring and dissenting opinion in *Time, Inc.* v. *Hill*, 385 U.S. 374, wrote that the film in *Feeney* v. *Young* was "so intimate and potentially embarrassing to an individual that the State may exercise its power to deter publication." 385 U.S. at 404. (It is difficult to conceive of information more intimate or embarrassing than that told by the patient to the psychiatrist and then retailed in the book, "In Search of A Response".)

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[1] Petitioners' brief at p. 8.

[2] See discussion at pp. 13-15 of this brief.

The duty of a physician to keep a patient's confidences inviolate is a statutory one. When the statutory duty is violated, the patient whose secrets have been divulged is entitled to redress. *Simonsen* v. *Swenson,* 104 Neb. 224, 177 N.W. 831, involved a Nebraska statute that provided for revocation of a physician's license for "betrayal of a professional secret to the detriment of a patient." The Court, speaking of the statute, said (177 N.W. at p. 832):

> "By this statute, it appears to us, a positive duty is imposed upon the physician, both for the benefit and advantage of the patient as well as in the interest of general public policy. The relation of physician and patient is necessarily a highly confidential one. It is often necessary for the patient to give information about himself which would be most embarrassing or harmful to him if given general circulation. This information the physician is bound, not only upon his professional honor and the ethics of his high profession, to keep secret, but by reason of the affirmative mandate of the statute itself. A wrongful breach of such confidence, and a betrayal of such trust, would give rise to a civil action for the damages naturally flowing from such wrong." [1]

See also *Clark* v. *Geraci,* 29 M.2d 791, 208 N.Y.S.2d 564, in which the Court said in holding that a breach of a doctor's obligation of secrecy is actionable: "[D]isclosure is plainly reprehensible as indicated by the statutory law in this State, accepted usage and the Hippocratic Oath, for in-

[1] The Court dismissed the complaint against the doctor in *Simonsen* because the confidential information revealed was, in the doctor's opinion, required to prevent infection. (Article 23 of the New York Public Health Law also requires the reporting of such information.)

formation possessed by the doctor concerning the illness of his patient has long been thought of as a protected professional confidence upon which every patient may rely"; *Hammonds* v. *Aetna Casualty & Surety Company*, 237 F. Supp. 96 at pp. 101, 102, and 243 F. Supp. 793 at pp. 795, 796; and *Davis* v. *Supreme Lodge, Knights of Honor*, 165 N.Y. 159, 58 N.E. 891.

The New York statutes passed to prevent physicians from divulging confidential communications received from their patients are CPLR 4504(a), enacted in its first version in 1828 (2 Rev. Stat. § 73 [1st ed. 1829]), p. 406, and New York Education Law §§ 6509, 6511, and concomitant regulations.

CPLR § 4504(a) provides:

> "Unless the patient waives the privilege, a person authorized to practice medicine . . . shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."[1]

The Education Law and the regulations[2] impose additional sanctions to discourage doctors from revealing information about their patients, by making the disclosure grounds for revocation or suspension of a doctor's right to practice.

CPLR § 4504(a) is a public health measure. It was designed to encourage reliance and dependence on doctors. At the time the law was passed, a client's revelations to his or her lawyer were protected under the common law, but a patient's disclosures to a doctor were not protected.

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[1] Petitioners concede that the Court below found that the statute is violated by the disclosure of confidential information whether the patient's identity is revealed, or not. See Petitioners' brief at pp. 9, 36.

[2] 8 New York Code of Rules and Regulations §60.1.

The New York legislature passed the law in the belief that without some guarantee of secrecy, people might be reluctant to confide in physicians and might withhold information essential for proper treatment and recovery. The legislators' notes state (3 Rev. Stat. [2d ed. 1836], p. 737):

> "The ground on which communications to *counsel* are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defence or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger."

The rule against a physician's disclosure of confidential information given in the course of treatment should be applied most stringently when the information is given by a patient to a psychiatrist.[1]

> ". . . [P]sychotherapy by its very nature is worthless unless the patient feels assured from the outset that whatever he may say will be forever kept confidential. Without a promise of secrecy from the therapist, buttressed by a legal privilege, a patient would not be prone to reveal personal data which he fears might evoke social disapproval. Not only is the data essential for the purpose of constructing a reliable case history, but also the catharsis achieved by its verbalization may itself be a significant factor in treatment." Note, *Confidential Communications to a Psychotherapist: A New*

[1] Six states that do not recognize the physician-patient privilege have laws protecting the confidentiality of a patient's disclosures to a psychiatrist. 7 Fla. Stats. Ann. §90.242; 13 A-Code of Ga. Ann. §38-418(5); 15 Ky. Rev. Stats. §421.215; 4A Annot. Code of Md., Art. 35 §13A; 8 Part 3 Ann. Laws of Mass. Chap. 233 §20B; 4 New Mex. Stats. 1953 §20-4-504.

Testimonial Privilege, 47 Northwestern U. L. Rev. 384, 386, 387.[1]

The psychiatrist in this case suggests[2] that as Freud published accounts of his cases, she should also be free to do so. Although a response to that argument seems unnecessary, it should be noted that Freud wrote, "It would be a grave breach of confidence to publish material . . . with the risk of the patients being recognized and their acquaintances becoming informed of facts which were confided only to the physician. It has therefore been impossible for us to make use of some of the most instructive and convincing of our observations." [3]

The Petitioners do not claim that the State lacks authority to legislate with respect to public health, or to prescribe standards for the practice of medicine in the state. See *Barsky* v. *Board of Regents,* 347 U.S. 442, 449; *Williamson* v. *Lee Optical Company,* 348 U.S. 483; *Lambert* v. *Yellowley,* 272 U.S. 581, 597. And Petitioners do not contend that the statutes on which the patient's cause is based are not in the public interest, or that they are not expedient, or that they are over-broad or vague.

The strength of the public policy underlying the prohibition of doctors' disclosure of confidential information re-

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[1] The *amici,* American Psychiatric Association, American Psychoanalytic Association and American Orthopsychiatric Association, in their proposed brief in support of the patient's position, explain the importance in psychotherapy of enabling "patients to expose the dark recesses of their minds" with assurance that whatever is said will not become public property.

[2] Petitioners' brief at pp. 29, 30.

[3] J. Breuer and S. Freud, *Studies on Hysteria,* vol. 2 (standard ed., Hogarth, 1955), p. 29. See M. H. Hollender, *Privileged Communication and Confidentiality,* Diseases of the Nervous System, vol 26, No. 3 (1965), p. 173; J. B. Robitscher, *Pursuit of Agreement: Psychiatry & The Law* (Lippincott, 1966), pp. 232-233.

ceived from patients, is evidenced by the existence of laws similar to one or both of the New York statutes, in forty-two other states.[1]

A law prohibiting doctors from broadcasting their patient's secrets does, it is true, interfere with the right of doctors to speak about their patients with complete freedom. But the limited restriction does not infringe the constitutional guarantee of free speech and press. Every restriction of speech does not create a constitutional problem. The Constitution doesn't guarantee the right to speak with complete freedom at all times and under all circumstances. *United Public Workers* v. *Mitchell*, 330 U.S. 75; *Colten* v. *Kentucky*, 407 U.S. 104, 111.

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[1] Alaska, Rules of Civil Procedure—Rule 43 (h4), Rules of Criminal Procedure—Rule 26(a, b); 4 Ariz. Rev. Stats. Ann. §12-2235, 5 Ariz. Rev. Stats. Ann. §13-1802(4); 3A Ark. Stats. Ann. §28-607; 29B Cal. (Ev) Code, Div. 8, Ch. 4, Art. 6, §§990-995, Art. 7 §§1010-1015; 7 Colo. Rev. Stats. §154-1-7(5); D.C.C.E. §14-307; 7 Hawaii Rev. Stats. §621-20.5; 2 Idaho Code §9-203(4); 51 Smith-Hurd Ill. Ann. Stats. §§5.1, 5.2; Burns Ind. Stats. Ann. —Code Ed. §34-1-14-5; Vol. 43 Iowa Code Ann. §622.10; 4 Kansas Stat. Ann. §60-427; 7 Louis. Rev. Stats. Ann. §13-3734; 9 Maine Rev. Stats. Ann. (1973 Supp.) Title 32 §3295, 9 Maine Rev. Stats. Ann. Title 16 §60; 33 Mich. MCLA §600-2157; 38 Minn. Stats. Ann. §595.02(4); 4 Miss. Code 1972 Ann. §13-1-21; 28 Vernon's Ann. Mo. Stats. Title 33, Ch. 491, §491.060; 7 Rev. Codes of Mont. Ch. 701 §93-701-4(4); 2 Rev. Stats. of Neb. (1964 reissue) §25-1206; 3 Nev. Rev. Stats. §49.215-235; 3 N.H. Rev. Stats. Ann. §329:26; Title 2A N.J. Stats. (Rev. 1951) 2A:84A-22.1 &22.2; 1B Gen. Stats. of N.C. §8-53; 6 N. Dak. Century Code Ann. §31-01-06; Title 23 Page's Ohio Rev. Code §2317.02; 12 Okla. Stats. Ann. §385; 1 Ore. Rev. Stats. §44.040; 28 Purden's Pa. Stats. Ann. §328; 7 S. Dak. Compiled Laws (1967) §19-2-3; 9 Utah Code Ann. §78-24-8(4); Title 12 Vt. Stats. Ann. §1612; 14 W. Va. Code §50-6-10; 2 Code of Va. Title 8 §8-289.1; Title 5 Wash. Rev. Code Ann. §5.60.060(4); 2 Wyo. Stats. 1957 Title 1 §1-139; 7 Fla. Stats. Ann. §90.242; 13 A-Code of Ga. Ann. §38-418(5); 15 Ky. Rev. Stats. §421.215; 4A Annot. Code of Md. Art. 35 §13A; 8 Part 3, Ann. Laws of Mass. Chap. 233 §20B; 4 New Mex. Stats. 1953 §20-4-504.

Criminal sanctions against extortion by threat to expose a secret or an incident that would subject the person threatened to contempt or ridicule,[1] may also be said to inhibit complete freedom of expression, but the restriction does not present any difficult constitutional problem. A doctor who subjects a patient to ridicule and contempt by publishing the intimate details of the patient's life also violates the law. If affording a civil remedy against such conduct is held to violate the Constitution, the laws prohibiting such disclosures by physicians will be ineffectual.

The First Amendment is not violated simply because conduct, properly proscribed in the public interest, is brigaded with expression. "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language either spoken, written or printed." *Cox* v. *Louisiana*, 379 U.S. 536, 555. The State is not powerless to deal with a wrong because in doing so it must prevent communication. "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' (see *NAACP* v. *Button*, 371 US 415, 444) which the legislature has the power to control." *California Transport* v. *Trucking Unlimited*, 404 U.S. 508, 515.

In *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, peaceful picketing was enjoined because its purpose and effect was to violate a law punishing unlawful restraint of trade. Mr. Justice Black wrote for the Court:

> "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now." (336 U.S. at p. 498)

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[1] New York Penal Law §155.05 subd. 2(e)(v).

> "In holding this, we are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press. . . . But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. Virginia Electric Co. v. Board, 319 US 533, 539, Thomas v. Collins, 323 US 516, 536-540." (336 U.S. at pp. 501, 502)

See also concurring opinion of Justices Black and Douglas in *Gregory* v. *Chicago*, 394 U.S. 111, 125. The doctrine of the *Giboney* case, although it involved a penal statute, is applicable with equal force to conduct made unlawful by civil statute. See cases cited at pages 19-21 of this brief.

The public policy underlying the law involved in this case is an important one of long standing. One of the statutes violated by the Petitioners has been in effect 146 years, and similar laws have been enacted throughout most of the country.[1] Denying an appropriate remedy to a patient whose confidences are published by a psychiatrist, in a "case history" or in a commercial book, would defeat the primary purpose of the forty-three state statutes enacted to preserve the confidentiality of patients' communications to physicians and psychiatrists.

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[1] See footnote at p. 39 of this brief.

Cf. *Giboney* v. *Empire Storage Co.*, 336 U.S. at p. 502, "The Missouri policy against restraints of trade is of long standing and is in most respects the same as that which the Federal Government has followed for more than half a century."

POINT III

There is no merit to petitioners' argument that an action for invasion of privacy brought by a private individual whose personal life is publicized in a "case history", can be sustained only if there is proof that the failure to conceal the complainant's identity was due to wilful disregard of "professional standards." [1]

Because of the professional relationship between them, the patient told the psychiatrist of painful experiences and memories she did not want anyone else to know. The psychiatrist's betrayal of the patient's trust, by publishing what was said to her in confidence, gave rise to the right of action discussed in Point II of this brief. But the publication of the material is itself actionable as an invasion of the patient's privacy, a right of action that is not dependent on the relationship of the parties.

The right of privacy is recognized and protected as a constitutional right because personal liberty is in part dependent on it. If we knew that whatever we said or did would be publicly reported, fear of disapproval, ridicule, reprisal or even fear of disagreement, might deter us from speaking freely, or from living our lives as we want to live them. Fried, *Privacy*, 77 Yale L.J. 475, 483; *Talley* v. *California*, 362 U.S. 60; *Bates* v. *Little Rock*, 361 U.S. 516; *NAACP* v. *Alabama*, 357 U.S. 449.

Mr. Justice Brandeis wrote in his noted dissent in *Olmstead* v. *United States*, 277 U.S. 438, 478: "The makers of

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[1] The issues discussed in this point are also not properly before the Court but are included in the event the Court wishes to consider them. See discussion at pages 13-15 of this brief.

our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone,—the most comprehensive of rights and the right most valued by civilized men." Mr. Justice Brandeis' dissent is now the prevailing view (*Stanley* v. *Georgia*, 394 U.S. 557) and the right of which he spoke, to be let alone by the government, is also protected against encroachment by individuals. *Galella* v. *Onassis*, 353 F. Supp. 196, 232, modified on other grounds, 487 F.2d 986.

There can be little doubt that the publishing of a private person's thoughts, recollections, ideas and emotions is an actionable interference with his or her right to be left alone.[1] "In Search of A Response" is a detailed report of the patient's sexual attitudes, attitudes toward people, opinions, and of her most intimate experiences. It also reports statements allegedly made by the patient's husband that were certain to have mortified the patient, in particular the husband's stated wish to murder the patient, his homosexual experience and his involvement with prostitutes.[2]

The Court below, in acknowledging that the patient set forth a valid cause for invasion of privacy (A 104-105), referred to authorities in which the common-law right of privacy (*Nader* v. *General Motors Corp.*, 25 N.Y.2d 560), and the constitutional right of privacy (*Griswold* v. *Con-*

[1] As Mr. Justice Brandeis wrote in his dissent in *Olmstead* v. *United States*, just quoted, "They [the makers of the Constitution] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." 277 U.S. 438, 478 (matter in brackets added).

[2] "In Search of A Response," Henry, pp. 34-38.

necticut, 381 U.S. 479, and *Roe* v. *Wade*, 410 U.S. 113) were sustained. The state Court's recognition of the patient's common-law right of action does not, as Petitioners acknowledge,[1] create a federal question this Court may consider.

The compass of the constitutional right of privacy has not yet been defined. The range is being explored as new cases involving the right arise. Mr. Justice Blackmun wrote for the Court in *Roe* v. *Wade*, 410 U.S. at 152: "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co.* v. *Botsford*, 141 U.S. 250, 251, the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley* v. *Georgia*, 394 U.S. 557, 564; in the Fourth and Fifth Amendments, *Terry* v. *Ohio*, 293 U.S. 1, 8-9, *Katz* v. *United States*, 389 U.S. 347, 350, *Boyd* v. *United States*, 116 U.S. 616, see *Olmstead* v. *United States*, 277 U.S. 438, 478 (Brandeis, J. dissenting); in the penumbras of the Bill of Rights, *Griswold* v. *Connecticut*, 381 U.S. 479, 484-485, in the Ninth Amendment, id., at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer* v. *Nebraska*, 262 U.S. 390, 399." See also *Griswold* v. *Connecticut*, 381 U.S. 479; *Stanley* v. *Georgia*, 394 U.S. 557; *Doe* v. *Bolton*, 410 U.S. 179;[2] *Cleveland Board of Education* v. *LaFleur*, —— U.S. ——, 39 L.Ed.2d 52.

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[1] At p. 28 of their brief.

[2] In *Roe* v. *Ingraham*, 480 F.2d 102, 108 fn. 8, the Court of Appeals for the Second Circuit said that language in the opinion in *Doe* v. *Bolton*, 410 U.S. 179, 194, could be read as "extending constitutional protection to the privacy of the doctor-patient relationship."

Mr. Justice Douglas, concurring in *Roe* v. *Wade*, listed "the autonomous control over the development and expression of one's intellect, interests, tastes and personality" as the first of the zones of privacy protected by the Constitution (410 U.S. at p. 211). To assure autonomous control a private person must, at the least, have the right to prevent the publicizing of personal information that would expose him or her to obloquy. See Fried, *Privacy*, 77 Yale L. J. 475, 483; Bloustein, *Privacy As An Aspect Of Human Dignity: An Answer To Dean Prosser*, 39 N.Y.U. L.Rev. 962, 971, 1003.

The constitutional right of privacy was held to have been violated by the publicizing of unsavory incidents of the complainant's past life, in *Melvin* v. *Reid*, 112 Cal. App. 285, 297 Pac. 91, 93; by the distribution of improperly obtained nude photographs of the complainant, in *York* v. *Story*, 324 F.2d 450, 454-456; by taking photographs of a public personality in an obtrusive manner, in *Galella* v. *Onassis*, 487 F.2d 986; by the use, in proceedings to remove a teacher, of derogatory information obtained from her physician, in *Drake* v. *Covington County Board of Education*, 371 F. Supp. 974.

The right of a patient to have his or her statements to a psychiatrist kept in confidence was held a right of privacy protected by the Constitution in *In re: Lifschutz*, 85 Cal.Rep. 829, 467 P.2d 557.[1] The Court said in that case:

> "We believe that a patient's interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots than

[1] The case involved the power of the Court to compel the production of a psychotherapist's records relating to the treatment of a patient. The Court held the psychiatrist could not ordinarily divulge such information, but was in that case required to produce the records because the patient waived the privilege by putting his mental condition in issue.

> the California statute and draws sustenance from our constitutional heritage. In *Griswold* v. *Connecticut*, supra, . . . the United States Supreme Court declared that 'Various guarantees [of the Bill of Rights] create zones of privacy,' and we believe that the confidentiality of the psychotherapeutic session falls within one such zone (Cf. *People* v. *Belous*, 458 P.2d 194). . . ." (467 P.2d at 567-568).

Petitioners maintain that "In Search of A Response" is a medical case history,[1] and that the psychiatrist in preparing the book, met "the usual professional standards for disguising the patient's identity." Petitioners also contend that their alleged attempt to disguise the patient's identity in accordance with professional standards, is a complete defense to an action for invasion of privacy brought because of the publication of personal material in a medical case history. Petitioners argue that to prevail in such an action, one must prove that there was a "wilful or reckless disregard of such standards."[2] If, despite the attempt to disguise, a complainant is identifiable as the subject of a case history, the Petitioners maintain, he or she is without remedy. "[T]o permit recovery upon mere negligence," Petitioners write, ". . . or even innocent failure to disguise sufficiently is totally improper and should not be countenanced by this Court."[3]

Petitioners' novel defense is based on the assumptions that (1) "In Search of A Response" is a medical "case-history", and (2) that the psychiatrist met the usual professional standards in disguising the identity of the patient and her husband. As shown earlier, at pages 10 and 11 of

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[1] The term is not defined.

[2] Petitioners' brief at p. 35.

[3] Petitioners' brief at pp. 8, 9, 30, 33-35.

this brief, the Court below considered the book a "commercial book" and not a scientific work. It also appears that the "usual professional standards for disguising a patient's identity" were not met by the psychiatrist. (See discussion at page 3 of this brief.)

We shall, for the sake of argument, assume that there is a factual basis for Petitioners' theory; there is not any legal authority to support it. It rests on the Petitioners' own application of the doctrine of *Time, Inc.* v. *Hill*, 385 U.S. 374,[1] to the circumstances of this case. Petitioners' reliance on *Time, Inc.* v. *Hill* is misplaced. Mr. Justice Brennan, speaking for the Court, specifically excluded the application of the rule of *Time, Inc.* v. *Hill* to privacy actions, such as this one, brought for revelations "so intimate and so unwarranted in view of the victim's position, as to outrage the community's notions of decency." (385 U.S. at p. 383, fn. 7).[2]

Time, Inc. v. *Hill*, 385 U.S. 374, was "not 'privacy litigation' in its truest sense".[3] It involved a public "newsworthy" figure, who was "substantially without privacy" (385 U.S. at pp. 383, 386). Mr. Justice Brennan, writing for the Court, stated that a "different test [other than the one applied by the Court in the 'discrete context' of the case] might be required in . . . a statutory action by a private individual," 385 U.S. at p. 391 (matter in brackets added).

Time, Inc. v. *Hill* involved an article in Life Magazine in part about Mr. Hill and his family. The Hill family had been held prisoner by three escaped convicts in 1952.

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[1] Discussed at pp. 29, 31, 32, 33, 34 and 35 of the Petitioners' brief.

[2] Judge O'Brien held in *Davis* v. *Supreme Lodge, Knights of Honor*, 165 N.Y. 159, 58 N.E. 891, that a physician's disclosures of a patient's secrets itself "shocks our sense of decency."

[3] Mr. Justice Harlan, concurring in part and dissenting in part, 385 U.S. at p. 404.

The event was the subject of many front page news stories. A few years later, Life published an article about a play involving a family held hostage by escaped convicts. The Life article gave the false impression that the play mirrored the Hills' experience. The article was not in any way defamatory. Hill sued the publisher of Life for damages, claiming that his statutory right to privacy was violated. The New York privacy statute (New York Civil Rights Law §§50, 51) prohibits the use (without permission) of one's name or photograph in advertisements or for purposes of trade. Hill had not consented to the article and claimed that it was published to advertise the play and increase the circulation of the magazine, and therefore was published for "the purposes of trade" within the meaning of the statute.

An action for violation of the New York privacy statute cannot be maintained when a newsworthy person's name or photograph is used in a factual news report. However, there is authority to the effect that if a news report is substantially false or is "fictionalized," it is not in fact a "news" report and may therefore be within the purview of the privacy statute. The question before the Court in *Time, Inc.* v. *Hill* was whether the New York privacy statute, as construed, impaired First Amendment rights.

As Hill's cause was for the publication of a false report about a public personality, the Court, in deciding that case, applied the rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, which involved allegedly false and defamatory reports about public officials. The Court held in *New York Times Co.* v. *Sullivan*, and it also held in *Time, Inc.* v. *Hill*, that "if the freedoms of expression are to have the 'breathing space' they 'need . . . to survive' . . ."[1] a false report

[1] *Time, Inc.* v. *Hill*, 385 U.S. at 388, quoting the opinion in *New York Times Co.* v. *Sullivan*, 376 U.S. at 271-272.

about a public person relating to matters of public interest is not actionable unless the falsity is calculated, that is, unless the report is made with knowledge of the falsity or with reckless disregard of the truth. *Time, Inc.* v. *Hill*, 385 U.S. at 389-391.

Petitioners submit that the applicability of the decision in *Time, Inc.* v. *Hill* to this case, "appears well-nigh indisputable."[1] Arguing that as the defendants in *Time, Inc.* v. *Hill* could not have been held liable for negligent failure to determine the truth or falsity of the article involved in that case, the psychiatrist maintains that she should not, in this case, be held liable for negligent failure to disguise the patient's identity in her (the psychiatrist's) book.[2] The leap from the special issue of the falsity of the news article in *Time, Inc.* v. *Hill* to the issue of the patient's identity in this case, is not explained.

The Court in *Time, Inc.* v. *Hill* said, and repeated, that its determination of that case was limited to the special circumstances of the case (385 U.S. at pp. 391, 397). Obviously the circumstances of *Time, Inc.* v. *Hill* are quite different from the factual situation in the instant case, and the two actions are for the enforcement of very different rights. The article involved in *Time, Inc.* v. *Hill* was not offensive, and it was actionable only because of the fictionalization of the events described. It is not necessary to set forth all the reasons that the doctrine of *Time, Inc.* v. *Hill* is not applicable to the instant case, for even if we were to assume that the general principles of *Time, Inc.* v. *Hill* would otherwise govern this case, the fact that the patient-plaintiff in this case is a private person, and not a newsworthy person, dictates a determination contrary to that reached in *Time, Inc.* v. *Hill*.

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[1] Petitioners' brief at p. 33.

[2] Petitioners' brief at pp. 32-35.

On June 25, 1974, this Court held in *Gertz* v. *Robert Welch, Inc.*, —— U.S. ——, 42 U.S.L.W. 5123, that the doctrine of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, is not applicable to an action for libel brought by a private person for publication of a defamatory article about him, though the subject of the article is a matter of general interest. The Court concluded that in an action for defamation brought by a private person, it is not necessary for the plaintiff to show that the false report was made with knowledge of its falsity, or with reckless disregard of the truth.

Mr. Justice Powell, explaining the difference between the rule governing a libel action brought by a public figure, and one brought by a private person, said in *Gertz*, —— U.S. ——, 42 U.S.L.W. at pp. 5129, 5130, "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater. . . . [T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office nor assumed an 'influential role in ordering society.' *Curtis Publishing Co.* v. *Butts*, *supra*, 388 U.S., at 164 (opinion of Warren, *C. J.*). He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."

The Court indicated in *Time, Inc.* v. *Hill,* 385 U.S. at p. 391, that had the action been brought by a private individual, a different rule might have been applied. Such an action, brought by a private person, would require application of the rule of the *Gertz* case, as the action in *Time, Inc.* v. *Hill,* brought by a public figure, required application of the doctrine of *New York Times Co.* v. *Sullivan.* It is clear that if the rule of *Time, Inc.* v. *Hill* were applicable to a case such as the one at bar, it would be applicable only if the subject of the case history were a public figure. Applying the principles of the *Gertz* case to this action brought by a private person, even "innocent failure to disguise sufficiently" is actionable.

A Discussion of Other Authorities Relied on By the Petitioners.

Petitioners refer to a law review article, Haiman, *Speech* v. *Privacy: Is There A Right Not To Be Spoken To?* 67 Northwestern U. L.Rev. 153, and a number of cases,[1] as authority for the statement "that even in the case of a clash between a privacy claim and a First Amendment claim, the primal magnitude of the First Amendment must prevail." The quotation from the article, in Petitioners' brief, is misleading. Material that Petitioners deleted from the portion of the article they quoted, reveals that the article does not apply to the right of privacy involved in this case.

In his law review article, Professor Haiman distinguished between the right not to be spoken about (the right involved in this case) and the right not to be spoken to (for example, the right to be protected from unwanted mail or from announcements made through loudspeakers on public streets). The portion of Professor Haiman's article set

[1] At p. 22 fn. 14 of the Petitioners' brief.

out in Petitioners' brief was edited so that it appears that the excerpt quoted relates to the right of privacy with which we are here concerned. The following is the quotation from the article in Petitioners' brief, with the deleted portion inserted and italicized.

> "[I]n the clash of free speech and privacy interests *surrounding claims of a right not to be spoken to,* we must be careful not to allow our natural sympathy for tender psyches to beguile us into accepting serious erosion of the First Amendment. The human psyche . . . is tougher than most of its would be protectors are inclined to admit. It is generally quite capable of taking care of itself." Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?* 67 Northwestern U. L. Rev. 153, 199.

Portions of Professor Haiman's article relating to the right not to be talked about, indicate an attitude different from that expressed in the quoted language. See 67 Northwestern U. L. Rev. pp. 153 to 157.

Public Utilities Comm'n v. *Pollak,* 343 U.S. 451, cited as authority for the rule that the constitutional right of expression takes precedence over the right of privacy, also involved a claim of right to be protected from unwanted communication. The plaintiff objected to broadcast music in public buses. The Court held that although there is a right to be free of amplified announcements that can be heard in one's home (*Kovacs* v. *Cooper,* 336 U.S. 77), one doesn't have that right of privacy when travelling on a public bus.

Albany Welfare Rights Organization v. *Wyman,* 493 F.2d 1319 (cited at page 22 of Petitioners' brief), involved a claim of the Welfare Bureau that the distribution of literature in the Bureau's waiting room interfered with

the right of welfare recipients to privacy. The Court held (493 F.2d at 1324):

> "We do not consider the right of privacy of the welfare recipients [in the public waiting room] as a compelling consideration against First Amendment rights. . . . This is not intrusion into the home, the church or the voting booth."

Lamont v. *Commissioner of Motor Vehicles*, 269 F. Supp. 880, *aff'd* 386 F.2d 449, *cert. den.*, 391 U.S. 915 (cited at page 22 of Petitioners' brief), does not relate to public disclosure of personal matters. In *Lamont*, the plaintiff attempted to prevent the Motor Vehicle Bureau from selling the names and addresses in its files to a mail order business. The information being sold from the registration records was available to the public. The Court found that the plaintiff did not state a cause for invasion of privacy.

In *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415[1] (cited as holding that First Amendment rights take precedence over the right of privacy), the Court held (402 U.S. at 418) that private rights were not in issue.

Petitioners refer, in a part of their brief quoted before,[2] to "the holdings of this Court that even in the case of a clash between a privacy claim and a First Amendment claim the primal magnitude of the First Amendment must prevail." That is not our reading of the Court's opinions. The precept distilled from the opinions of the Court is that when the constitutional rights of communication and privacy are in conflict, the Court in determining which right shall prevail, considers the purpose and the impact of

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[1] Also discussed at p. 31 of this brief.

[2] Petitioners' brief at p. 22 fn. 14.

the limitation on the right of speech, and the depth of the threatened intrusion into private lives. Thus in *Breard* v. *Alexandria,* 341 U.S. 622, a law prohibiting door-to-door solicitation of magazines and other canvassing was held constitutional against attack on the ground that it infringed freedom of expression. The Court said, "This case calls for an adjustment of constitutional rights in the light of the particular living conditions of the time and place. . . ." (341 U.S. at 626-627). "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life." (341 U.S. at 642).

And in *Rowan* v. *Post Office Dept.,* 397 U.S. 728, the Court said, in sustaining a limitation on the right of communication by mail:

> "Without doubt the public postal system is an indispensable adjunct of every civilized society and communication is imperative to a healthy social order. But the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." (397 U.S. at 736). If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient." (397 U.S. at 738).

In the instant case, the limitation on the physician's right of communication is a minor one. One can transmit information about a mental condition and the treatment of it, without publishing a transcript of psycho-therapeutic sessions between a psychiatrist and patient. The professional associations of psychiatrists believe that compliance with

existing statutes that prevent disclosure of a patient's confidences will not hamper, and have not hampered, the dissemination of medical learning. The public interest demands the limitation, not the protection, of the right of physicians to divulge their patients' confidences. The achievement of the public objective, and the prevention of the massive invasion of the patient's constitutional right to privacy, and the intrusion upon the lives of others if the Petitioners' position had been sustained, required issuance of the order under review.

There should also be weighed in the balance, the loss, if the Petitioners should prevail, of public confidence in psychiatrists and psychiatry. That, of course, is the reason the psychiatrists' associations oppose the psychiatrist's position in this case.

CONCLUSION

For the reasons outlined the order of the New York Court of Appeals in this case should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

CONSTITUTION OF THE STATE OF NEW YORK

Article 6, Section 3 [Jurisdiction of court of appeals]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

NEW YORK CIVIL PRACTICE LAW AND RULES

§ 2218. Trial of issue raised on motion.

The court may order that an issue of fact raised on a motion shall be separately tried by the court or a referee. If the issue is triable of right by jury, the court shall give the parties an opportunity to demand a jury trial of such issue. Failure to make such demand within the time limited by the court, or, if no such time is limited, before trial begins, shall be deemed a waiver of the right to trial by jury. An order under this rule shall specify the issue to be tried.

§ 4504. Physician, dentist and nurse.

(a) Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medic[illegible] . . . shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. . . .

§ 5501. Scope of review.

(c) Appellate division. The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal.

§ 5612. Presumptions as to determinations of questions of fact.

(b) Appeal on certified questions of law. On an appeal on certified questions of law, the court of appeals shall presume that questions of fact as to which no findings are made in the order granting permission to appeal or in the order appealed from or in the opinion of the appellate division were determined in favor of the party who is respondent in the court of appeals.

§ 6301. Grounds for preliminary injunction and temporary restraining order.

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

§ 6311. Preliminary injunction.

1. A preliminary injunction may be granted only upon notice to the defendant. Notice of the motion may be served with the summons or at any time thereafter and prior to judgment. A preliminary injunction to restrain a public officer, board or municipal corporation of the state from performing a statutory duty may be granted only by the supreme court at a term in the department in which the officer or board is located or in which the duty is required to be performed.

R. 6312. Motion papers; undertaking.

(a) Affidavit; other papers. On a motion for a preliminary injunction the plaintiff shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action, and either that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual; or that the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

(b) Undertaking. Except as provided in section 2512, prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction, . . .

NEW YORK STATE CIVIL RIGHTS LAW

§ 50. Right of privacy.

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. Action for injunction and for damages.

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. . . .

NEW YORK STATE EDUCATION LAW

Subarticle 3. Professional Misconduct

§ 6509. Definitions of professional misconduct.

Each of the following is professional misconduct, and any licensee found guilty of such misconduct under the procedures prescribed in section sixty-five hundred ten shall be subject to the penalties prescribed in section sixty-five hundred eleven:

(9) Committing unprofessional conduct, as defined by the board of regents in its rules or by the commissioner in regulations approved by the board of regents.

§ 6511. Penalties for professional misconduct.

The penalties which may be imposed by the board of regents on a present or former licensee found guilty of professional misconduct (under the definitions and proceedings prescribed in sections sixty-five hundred nine and sixty-five hundred ten of this article) are: (1) censure and reprimand, (2) suspension of license, (3) revocation of license, (4) annulment of license or registration, and (5) limitation on registration or issuance of any further license. The board of regents may stay such penalties and place the licensee on probation and may restore a license which has been revoked.

NEW YORK CODE OF RULES AND REGULATIONS

Section 60.1

(d) *Unprofessional conduct in the practice of medicine* shall include but not be limited to the following:

(3) the revealing of facts, data or information obtained in a professional capacity relating to a patient or his records without first obtaining consent of the patient or his duly authorized representative, except if duly required by a court of competent jurisdiction or statute. Nothing in this Part shall prohibit a physician from making such facts, data or information available to a department of State government, providing that such department shall when requesting such facts, data or information notify the physician in writing that such facts, data or information shall be used only for research and study and that their con-

fidential nature shall be maintained; nor shall the revealing of such facts, data or information by a physician or a hospital to attorneys to aid in defense of a suit or claim against them by a former patient constitute unprofessional conduct . . . .

NEW YORK STATE PENAL LAW

Section 155.05

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

(e) By extortion.

A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will:

(v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule . . . .